

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

7

DECISION

TOPIC

Referrals to the Attorney General

The Director requests the referral of the following to the Attorney General for appropriate legal action. Litigation reports have been provided to the commissioners and are confidential pursuant to Iowa Code section 22.7(4). The parties have been informed of this action and may appear to discuss this matter. If the Commission needs to discuss strategy with counsel on any matter where the disclosure of matters discussed would be likely to prejudice or disadvantage its position in litigation, the Commission may go into closed session pursuant to Iowa Code section 21.5(1)(c).

- Maple Grove Farms, L.L.C. (Plymouth County) – Animal Feeding Operations
- 76 Ltd. (Washington County) – Animal Feeding Operations / Air Quality / Solid Waste

Edmund J. Tormey, Chief
Legal Services Bureau

December 17, 2008

LITIGATION REPORT

Prepared by: Kelli Book Date: December 22, 2008
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I. Alleged Violator

Jack J. Grubb, Registered Agent
Maple Grove Farms, L.L.C.
600 4th Street, Suite 213
Sioux City, Iowa 51101

Nicole Grubb, Contact
Maple Grove Farms, L.L.C.
600 4th Street, Suite 213
Sioux City, Iowa 51101

II. Description of Facility

Maple Grove Farms, L.L.C. (Maple Grove) owns several animal feeding operations in northwest Iowa. Each of the animal feeding operations is required to submit an updated manure management plan (MMP) and compliance fee each year.

III. Alleged Violations (including facts and applicable law)

A. FACTS

Maple Grove's **Ohlendorf Site (facility #59085)** is located in Section 35, Remsen Township, Plymouth County, Iowa. The 2007 updated MMP and compliance fee for the facility were due December 1, 2007. The compliance fee for this facility is \$240.00. On October 8, 2007, DNR Field Office 3 sent a notice of the requirements to Maple Grove. On December 11, 2007 and January 14, 2008, DNR Field Office 3 sent Notice of Violation letters to Maple Grove. On February 8, 2008, DNR Field Office 3 sent a notice of referral to Maple Grove. To date the 2007 MMP update and fee have not been submitted.

The 2008 updated MMP and compliance fees for the facility were due December 1, 2007. On October 7, 2008 and on December 11, 2008, DNR Field Office 3 sent a notice of requirements to Maple Grove. To date the 2008 MMP update and fee have not been submitted.

Maple Grove's **Maass Site (facility #64681)** is located in Section 7, Henry Township, Plymouth County, Iowa. The updated MMP and compliance fee for the facility were due June 1, 2008. The compliance fee for this facility is \$300.00. On April 7, 2008, DNR Field Office 3 sent a notice of the requirements to Maple Grove. On June 10, 2008, DNR Field Office 3 sent a Notice of Violation letter to Maple Grove. On July 8, 2008, the required forms were faxed to Nicole Grubb, Maple Grove employee, following a telephone conversation between her and DNR Field Office 3. On August 13, 2008, DNR Field Office 3 sent a notice of referral to Maple Grove. To date the MMP update and fee have not been submitted.

Maple Grove's **Nilles Site (facility #59076)** is located in Section 8, Henry Township, Plymouth County, Iowa. The updated MMP and compliance fee for the facility were due July 1, 2008. The compliance fee for this facility is \$240.00. On May 8, 2008, DNR Field Office 3 sent a notice of the requirements to Maple Grove. On July 10, 2008, DNR Field Office 3 sent a Notice of Violation letter to Maple Grove. On August 13, 2008, DNR Field Office 3 sent a notice of referral to Maple Grove. To date the MMP update and fee have not been submitted.

Maple Grove **Facility #59056** is located in Section 17, Garfield Township, Plymouth County, Iowa. The updated MMP and compliance fee for the facility were due August 1, 2008. The compliance fee for this facility is \$111.00. On June 5, 2008, DNR Field Office 3 sent a notice of the requirements to Maple Grove. On August 12, 2008, DNR Field Office 3 sent a Notice of Violation letter to Maple Grove. On September 11, 2008, DNR Field Office 3 sent a notice of referral to Maple Grove. To date the MMP update and fee have not been submitted.

Maple Grove's **Galles Site (facility #59060)** is located in Section 21, Henry Township, Plymouth County, Iowa. The updated MMP and compliance fee for the facility were due September 1, 2008. The compliance fee for this facility is \$240.00. On July 7, 2008, DNR Field Office 3 sent a notice of the requirements to Maple Grove. On September 10, 2008, DNR Field Office 3 sent a Notice of Violation letter to Maple Grove. On October 14, 2008, DNR Field Office 3 sent a notice of referral to Maple Grove. To date the MMP update and fee have not been submitted.

Maple Grove's **Beaver Site (facility #65122)** is located in Section 26, Henry Township, Plymouth County, Iowa. The updated MMP and compliance fee for the facility were due February 1, 2008. The compliance fee for this facility is \$288.00. On December 10, 2007, DNR Field Office 3 sent a notice of the requirements to Maple Grove. On February 12, 2008 and March 5, 2008, DNR Field Office 3 issued Notice of Violation letters to Maple Grove. On March 18, 2008, DNR Field Office 3 sent a notice of referral to Maple Grove. On July 24, 2008, Administrative Order No. 2008-AFO-27 was issued to Maple Grove for failing to submit the updated MMP and compliance fee. The order required Maple Grove to submit the updated MMP and compliance fee within 30 days and to pay a penalty of \$3,500.00. The order was not appealed. To date the MMP update, the fee, and the penalty have not been submitted. The order is attached to this litigation report.

On October 23, 2008, DNR Field Office 3 sent an email to Nicole Grubb with a list of the facilities that had overdue updated MMPs and compliance fees. The email informed Ms. Grubb what needed to be submitted. Ms. Grubb replied to the email with an additional email stating that she would begin working on the MMPs immediately. To date the MMPs, compliance fees, and administrative penalty from Administrative Order No. 2008-AFO-27 have not been submitted.

B. APPLICABLE LAW

567 IAC 65.16(3) requires that all persons required to submit a MMP to also submit an updated MMP and compliance fees on an annual basis. This requirement became effective March 1, 2003. The compliance fee is fifteen cents per animal unit. Maple Grove failed to submit updated MMPs and compliance fees for the following facilities: Ohlendorf Site, Maass Site, Nilles Site, Galles Site, and Facility #59056.

Administrative Order Number 2008-AFO-27 required Maple Grove to submit an updated MMP, a compliance fee of \$288.00, and a penalty of \$3,500.00 for the Beaver Site. To date the MMP, compliance fee, and penalty have not been submitted and administrative order has not been complied with.

IV. Witnesses

The following DNR Field Office 3 personnel will be potential witnesses: Londa Witte and Cindy Martens. Ms. Martens will be available during the January 13, 2009 EPC meeting to answer additional questions.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER

IN THE MATTER OF:

Maple Grove Farms, LLC
Section 26, Henry Township
Plymouth County, Iowa
Facility ID#65122ADMINISTRATIVE ORDER
NO. 2008-AFO- 27**TO:** Jack J. Grubb, Registered Agent
Maple Grove Farms, LLC
600 4th Street, Suite 213
Sioux City, Iowa 51101

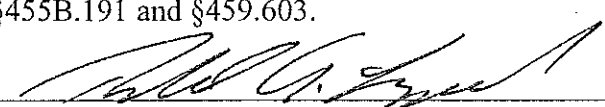
VIOLATION: 567 Iowa Administrative Code (IAC) 65.16(3)"b" and "c". You failed to submit a complete manure management plan (MMP) update to the DNR, to the board of supervisors of the county where your confinement feeding operation is located, and to the board of supervisors of each county where manure from your confinement feeding operation is land-applied, by February 1, 2008. You also failed to submit your annual compliance fee of \$0.15 per animal unit capacity at your animal feeding operation by that date. The facility was sent a notice of the requirements on December 10, 2007, and two notice of violation letters on February 12, 2008 and March 5, 2008. On March 18, 2008, the facility was sent a notice of referral.

ORDER: You shall submit your complete MMP and compliance fees to DNR Field Office 3 within 30 days of your receipt of this administrative order. In addition, a penalty of \$3,500.00 is assessed effective 30 days from your receipt of this administrative order, and shall be paid to the DNR, at the address listed below, within 60 days of your receipt of this administrative order, unless you appeal as provided below. \$500.00 of this amount is assessed for economic benefit from delayed payment of fees and delayed preparation costs. \$1,500.00 of this amount is based on the gravity of the violation; considering the size of this facility, agency costs in addressing this violation, the importance of the animal feeding operation program, and the threat to the integrity of the animal feeding operation program. \$1,500.00 of this amount is for culpability; the MMP requirements have been widely publicized in the industry, ample time for compliance was allowed, and the facility was sent three notices of the requirements by the DNR.

AUTHORITY: Iowa Code §455B.109, §459.103(3); 567 IAC 10.3, 567 IAC 65.16(3).

APPEAL: Iowa Code §455B.109; 561 IAC 7.5(1) A written Notice of Appeal may be filed with the Director, at the address provided below, within 30 days of your receipt of this administrative order. A contested case hearing will then be commenced pursuant to Iowa Code chapter 17A and 561 IAC 7. You may contact Kelli Book, attorney for the DNR, at (515) 281-8563 for more information regarding appeal procedures and resolution of this administrative order.

NONCOMPLIANCE: If you fail to comply with this administrative order you may be subject to further penalties pursuant to Iowa Code §455B.109 or penalties and injunction pursuant to Iowa Code §455B.191 and §459.603.



RICHARD A. LEOPOLD, DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES
502 East Ninth Street; Wallace State Office Building, Des Moines, Iowa 50319Dated this 24 day of
July, 2008

RECEIVED

AUG 04 2008

LITIGATION REPORT

Prepared by: Kelli Book Date: December 22, 2008
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I. Summary

The DNR seeks referral of 76 Ltd. the Attorney General's Office for appropriate enforcement action, due to numerous violations of water quality regulations, solid waste regulations, and air quality regulations. This referral includes the following violations: (1) failure to retain all manure; (2) failure to maintain two feet of freeboard; (3) improper land application; (4) failure to notify of a manure release; (5) improper use of spray irrigation; (6) general water quality violations; (7) prohibited discharge; (8) improper disposal of dead animals; (9) improper composting; (10) open burning; and (11) improper manure application certification.

II. Alleged Violator

John Klein, Registered Agent
76 Ltd.
1980 Elm Avenue
Keota, Iowa 52248

Kevin Greiner, Owner
76 Ltd.
33695 Highway 92
Keota, Iowa 52248

Mark Beenblossom, Owner
76 Ltd.
1025 W. Monroe Street
Washington, Iowa 52353

III. Description of Facility

76 Ltd. is located at 1980 Elm Avenue, Keota, Iowa in Section 23 of Seventy Six Township, Washington County. 76 Ltd. is owned by John Klein, Kevin Greiner, and Mark Beenblossom. The facility consists of four interconnected confinement buildings, two hoop buildings, and an earthen manure storage structure. The facility has 2,342 head of swine (938 animal units).

IV. Alleged Violations

a. Facts

On September 19, 2008, DNR Field Office 6 received a complaint stating that there was a dip in the road with a wet spot in Statler Park near Keota, Iowa. The complainant stated that it had not rained so the complainant believed there was something else keeping the spot wet. The complainant stated there was a confinement facility to the north of the park. The facility the complainant referred to was 76 Ltd.'s facility.

LITIGATION REPORT for 76 Ltd. December 2008

On September 19, 2008, Mark Heiderscheit, DNR Field Office 6 environmental specialist, investigated the complaint. Mr. Heiderscheit visited the 76 Ltd. facility and observed standing water in the ditch north of 200th Street and south of the earthen manure storage structure at 76 Ltd. The water was purple in color and the ammonia field test indicated >3 mg/L. An inspection of the earthen manure storage structure revealed the following deficiencies: 1) erosion of the outer berm; 2) poor vegetation and weeds; 3) trees and woody vegetation around the outer berm; 4) less than two feet of freeboard; 5) rodent holes; and 6) a discharge from the west side of the earthen manure storage structure to the road ditch. Mr. Heiderscheit also noted that the facility had a burn barrel. Mr. Heiderscheit then spoke to Rick Bethke, facility manager, and informed him of the manure discharge. Mr. Bethke stated he was aware there may be a problem. Mr. Bethke informed Mr. Heiderscheit that the facility had been given permission to pump on CRP ground. Mr. Heiderscheit reminded Mr. Bethke to document this addition on the manure management plan (MMP). Mr. Heiderscheit collected a laboratory sample of the discharge from the west side of the berm. John Klein and Kevin Greiner arrived on site and discussed the situation with Mr. Heiderscheit. Mr. Klein informed Mr. Heiderscheit that the owners of the facility were Mr. Klein, Mr. Greiner, and Mark Beenblossom. As Mr. Heiderscheit left the facility, Mr. Klein, Mr. Greiner, and Mr. Bethke were in the process of backing the pump into the earthen manure storage structure and connecting the hoses. The method of application being used was spray irrigation. Mr. Heiderscheit observed that the manure flowed through a pipe and not an umbilical hose that could be rolled up. Mr. Klein indicated that they would bring in a vacuum truck the following day to remove the discharge from the ditch. Further review of the manure applicator certification records indicated that Mr. Bethke was the only one of the three who had the proper manure applicator certification.

On September 20, 2008, Mr. Heiderscheit returned to the facility. Mr. Heiderscheit entered the field and parked between the creek to the south and the irrigator to the north and west of the grass waterway. The spray irrigator was set up on a ridge line west and south of the facility. Mr. Heiderscheit heard running water and observed purplish pink colored liquid being discharged from a tile line to the West Fork of Crooked Creek. Mr. Heiderscheit talked to Mr. Klein and informed him that the irrigation pumps should be turned off. Mr. Klein met Mr. Heiderscheit at the tile and stated that he had turned the pumps off. Mr. Klein stated he had been watching for surface runoff, but had not thought about the tile line. He left to search for the location of where the manure was entering the tile. Mr. Heiderscheit collected samples of the liquid and began to walk the grass waterway. He observed manure flowing through the waterway. Near the tile outfall, Mr. Heiderscheit discovered a depression or sink hole and this was the location the manure was entering the tile. Mr. Heiderscheit proceeded to the facility and met with Mr. Klein and Mr. Bethke. Mr. Heiderscheit informed them of where the manure was entering the tile and told them they needed to stop the discharge from the tile line and pump the earthen manure storage structure down to reach the required two feet of freeboard. Mr. Heiderscheit visited locations along Crooked Creek to check for signs of a fish kill. The slug of the discolored water first appeared at the Fir Avenue bridge and the field tests indicated the ammonia level was approximately 1.2 mg/L. There was no evidence of a fish kill at this location. The confluence of an unnamed tributary to the West Fork of

LITIGATION REPORT for 76 Ltd. December 2008

Crooked Creek to the east of Statler Park was running clear. Mr. Heiderscheit noted that the slug of discolored water was bypassing the mouth of the confluence. A field test taken at the mouth of confluence indicated the ammonia level was approximately 3.0 mg/L. There was no evidence of fish kill at this location.

The laboratory samples collected by Mr. Heiderscheit indicated the following:

Location	Ammonia	Fecal Coliform	E Coli	Biochemical Oxygen Demand (BOD)	Total Suspended Solids (TSS)
Ditch South of the Basin and North of 200 th Street	160 mg/L	N/A	N/A	N/A	N/A
Berm of the Basin	210 mg/L	N/A	N/A	N/A	N/A
Upstream of the manure discharge	<0.05 mg/L	1,000/100mL	800/100mL	<2 mg/L	9 mg/L
Tile/Effluent Point	80 mg/L	480,000/100mL	300,000/100mL	98 mg/L	220 mg/L
Confluence/Point where ditch met the stream	59 mg/L	280,000/100mL	230,000/100mL	80 mg/L	800 mg/L
Downstream of the manure discharge	4.4 mg/L	37,000/100mL	33,000/100mL	7 mg/L	49 mg/L

The samples results were sent to 76 Ltd. on October 3, 2008.

On September 21, 2008, Mr. Heiderscheit visited the site again. No one was on site at the time. Mr. Heiderscheit noted that the discharge had stopped; however, the earthen storage structure had not been pumped down to obtain the required two feet of freeboard. Mr. Heiderscheit also observed dead animals on top of the compost pile and leachate flowing downhill from the pile. Mr. Heiderscheit investigated the burn barrel he first saw on September 19, 2008. The burn barrel contained various solid waste including but not limited to tin cans, beverage containers, and plastic bottles.

On September 23, 2008, Mr. Heiderscheit and Aaron Pickens, DNR Field Office 6 environmental specialist, conducted another visit to the site. The ditch along 200th Street had been pumped; but the earthen manure storage structure had not been pumped down to meet the required two feet of freeboard. The field office personnel noted poor vegetation and weeds on the berm along with trees and woody vegetation on the outer berm. They also noted erosion of the berm and rodent holes with large animal burrows. The field office personnel informed Mr. Klein that the field office would visit the facility every other day until the earthen manure storage structure was pumped down.

LITIGATION REPORT for 76 Ltd. December 2008

On September 24, 2008, DNR Field Office 6 issued a Notice of Violation letter to 76 Ltd. for numerous water quality, air solid and solid waste violations discovered during the field office's September inspections at the facility. The letter required 76 Ltd. to take the following actions: 1) ensure compliance with all animal feeding operation regulations; 2) prevent future discharges; 3) notify the DNR within six hours of discovery of a release; 4) immediately pump the earthen manure storage structure to be in compliance with the freeboard requirements; 5) maintain a minimum of two feet of freeboard; 6) ensure land application of manure does not enter a water of the state; 7) by October 21, 2008, hire an engineer to perform an evaluation of the entire operation; 8) by December 15, 2008, submit a copy of that assessment to DNR; 9) submit a letter from the engineer that earthen manure storage structure work has been completed and meets design standards; 10) ensure compliance with the solid waste disposal regulations; 11) ensure that all people involved in the application of manure for the facility are properly certified; and 12) ensure compliance with the open burning and asbestos regulations. The letter also informed the facility that the matter was being reviewed for further enforcement.

On September 26, 2008, Mr. Heiderscheit and Russ Royce, DNR Field Office 6 environmental specialist, conducted a follow-up visit at the site. No facility personnel were present at the time of the inspection. The earthen basin storage structure had not been pumped down to meet the two feet of freeboard requirement. The DNR personnel noted the continued problems with the berm including: poor vegetation and weeds, trees and woody vegetation, erosion, and rodent holes. Mr. Heiderscheit and Mr. Royce noted manure solids and liquid on the ground between the earthen manure storage structure and the confinement buildings. The release appeared to be caused by a broken pipe. The confinement manure pit was within inches of overflowing. Mr. Heiderscheit left a message at the facility office informing facility personnel of the visit and suggesting the pit and storage structure be pumped immediately. Mr. Klein and Mr. Heiderscheit later discussed the visit's findings via a telephone conversation. Mr. Klein was informed the field office would be making periodic visits to the facility.

On October 2, 2008, Mr. Heiderscheit and Bert Noll, DNR Field Office 6 environmental specialist, conducted a follow-up visit to the facility. During the visit, they spoke with a gentleman who was pumping manure at the facility. It was determined this person was not properly certified to be handling manure for 76 Ltd. Mr. Heiderscheit and Mr. Noll inspected the earthen manure storage structure and noted little change since the last visit on September 26, 2008. The earthen manure storage structure did not meet the minimum requirement of two feet of freeboard. The problems with poor vegetation and weeds, trees and woody vegetation, erosion and rodent holes continued with the berm. Mr. Heiderscheit and Mr. Noll noted manure solids and liquids on the ground between the earthen manure storage structure and the confinement buildings. In addition, a total of three burn barrels were noted at the facility. One of the barrels contained the remains of aerosol cans.

On October 7, 2008, Mr. Heiderscheit and Jon Ryk, DNR Field Office 6 environmental specialist, conducted a follow-up visit at the facility. The earthen manure storage structure failed to meet the minimum requirement of two feet of freeboard; however, the

LITIGATION REPORT for 76 Ltd. December 2008

earthen manure storage structure was within a few inches of meeting the requirement. The majority of the grass and weeds had been removed around the earthen manure storage structure; however, there was some grass that remained that needed to be removed. Most of the smaller trees had been cut down, but the larger ones remained on the outer berm. The erosion and rodent holes remained and the berm had been damaged by the machinery being used to clear the berm. Most of the manure solids and liquids had been removed from the ground. Mr. Heiderscheit and Mr. Ryk noted bones and carcasses that had not been covered on the compost pile. There was also leachate on the ground. Following the visit, the facility's consultant contacted Mr. Heiderscheit to discuss the evaluation of the facility. On October 10, 2008, DNR personnel took part in a telephone conference call with the facility's consultant to discuss what was needed in the facility assessment.

On October 13, 2008, DNR sent 76 Ltd. a letter regarding the October 8 visit. It was noted that the earthen manure storage structure still did not meet the two feet of freeboard requirement, but that it was within a few inches of meeting the requirement. The letter required that the facility continue to pump down the earthen manure storage structure to meet the requirement. 76 Ltd. was once again reminded this matter was being referred for further enforcement.

On October 15, 2008, Mr. Heiderscheit and Ryan Stouder, DNR Field Office 6 environmental specialist, returned to the facility to conduct a follow-up visit. There appeared to be no changes since the previous inspection on October 7. The earthen manure storage structure still did not meet the 2 feet of freeboard requirement; it was within a few inches of meeting the requirement. The majority of the grass and weeds had been removed around the earthen manure storage structure; however, there was some grass that remained that needed to be removed. Most of the smaller trees had been cut down, but the larger ones remained on the outer berm. The erosion and rodent holes remained and the berm had been damaged by the machinery being used to clear the berm. Most of the manure solids and liquids had been removed from the ground. On October 29, 2008, 76 Ltd. forwarded to DNR Field Office 6 a copy of the Engineering Services Agreement with French Reneker Associates, Inc. for the evaluation of the waste storage system at the facility. On December 15, 2008, French Reneker Associates, Inc. forwarded the evaluation of 76 Ltd. to DNR Field Office 6.

b. Law

567 Iowa Administrative Code (IAC) 65.2(3) states that the minimum level of manure control for a confinement feeding operation shall be the retention of all manure produced in the confinement enclosures between periods of manure application. In no case shall manure from a confinement feeding operation be discharged directly into a water of the state or into a tile line that discharges to a water of the state. On September 19, 2008, DNR Field Office 6 observed that the earthen manure storage structure had no freeboard and that the manure was flowing over the top of the structure to the road ditch located along Elm Avenue. On September 26, 2008 and October 2, 2008 manure solids and liquids were observed on the ground between the earthen manure storage structure and

LITIGATION REPORT for 76 Ltd. December 2008

the confinement buildings. The above mentioned facts indicate several violations of this provision.

567 IAC 65.2(3)"b" states that manure shall be removed from the control facilities as necessary to prevent overflow or discharge of manure from the facilities. Manure stored in unformed manure storage structures or earthen waste slurry storage basins shall be removed from the structures as necessary to maintain a minimum of two feet of freeboard in the structure. On September 19, 2008, DNR Field Office 6 observed that the earthen manure storage structure had no freeboard and that manure was discharging over the top of the structure to the road ditch located along Elm Avenue. Follow-up visits by DNR Field Office 6 on September 23, September 26, October 2, October 7, and October 15 indicated that the freeboard did not meet the minimum requirement of two feet. As of October 15, 2008, the earthen manure storage structure had been out of compliance with the freeboard requirement for at least 27 days.

567 IAC 65.2(7) states that all manure removed from an animal feeding operation or its manure control facilities shall be land-applied in a manner which will not cause surface or groundwater pollution. On September 20, 2008, DNR Field Office 6 noted runoff from the land application of manure by spray irrigation entered a field tile that discharged into a ditch to the West Fork of Crooked Creek. The field office confirmed that the manure had reached the creek. The above mentioned facts indicate a violation of this provision.

Iowa Code section 455B.186 and 567 IAC 62.1(1) state that a pollutant shall not be disposed of by dumping, depositing, or discharging such pollutant into any water of the state except that this section shall not be construed to prohibit the discharge of adequately treated sewage, industrial waste, or other waste pursuant to a permit issued by the Director. On September 20, 2008, DNR Field Office 6 noted runoff from the land application of manure by spray irrigation entered a field tile that discharged into a ditch to the West Fork of Crooked Creek. The field office confirmed that the manure had reached the creek. The above mentioned facts indicate a violation of this provision.

567 IAC 65.3(2)"c" states that spray irrigation equipment shall be operated in a manner and with an application rate and timing that does not cause runoff of the manure onto the property adjoining the property where the spray irrigation equipment is being operated. On September 20, 2008, DNR Field Office 6 noted runoff from the land application of manure by spray irrigation entered a field tile that discharged into a ditch to the West Fork of Crooked Creek. The above mentioned facts indicate a violation of this provision.

567 IAC 65.2(9)"a" states that a person storing, handling, transporting, or land-applying manure from a confinement feeding operation who becomes aware of a release shall notify the DNR of the occurrence of the release as soon as possible but not later than six hours after the onset or discovery of the release. On September 19, 2008, DNR Field Office 6 observed manure discharging over the top of the earthen manure storage structure to the road ditch located along Elm Avenue. Mr. Bethke was contacted and notified of the release. Mr. Bethke indicate he was aware of the problem and then

LITIGATION REPORT for 76 Ltd. December 2008

clarified he was aware there may be a problem. The above mentioned facts indicate a possible violation of this provision.

567 IAC 65.19(1) states that a commercial manure service, a commercial manure service representative or a confinement site manure applicator shall not apply dry or liquid manure to land unless the person is certified. On September 19, 2008, DNR Field Office 6 observed Mr. Bethke, Mr. Klein, and Mr. Greiner setting up the spray irrigation system in an attempt to begin drawing down the earthen manure storage structure. A file review on September 22, 2008, indicated that Mr. Bethke was the only person certified as a confinement site applicator. Additionally, on October 2, 2008, DNR Field Office 6 observed a gentleman pumping manure at the facility. The gentleman was not certified to be handling manure for 76 Ltd. The above mentioned facts indicate violations of this provision.

567 IAC 61.3(2) provides general water quality criteria and prohibits discharges that will produce objectionable color, odor or other aesthetically objectionable conditions; settle to form sludge deposits; interfere with livestock watering; or are toxic to animal or plant life. On September 20, 2008, DNR Field Office 6 observed discoloration and sludge in the West Fork of Crooked Creek from the manure discharge caused by 76 Ltd.'s irrigation system. Additionally, laboratory results indicated elevated levels of Ammonia, BOD, TSS, Fecal Coliform, and E. Coli in the West Fork of Crooked Creek due to the manure discharge. The above mentioned facts indicate several violations of the general water quality criteria.

567 IAC 105.6(6) states that dead farm animals shall be incorporated into the composting process within 24 hours of death. An adequate base layer with 6 to 12 inches of bulking agent between carcasses and an additional 12 inches of cover material shall be maintained around carcasses at all times. On September 21, 2008, DNR Field Office 6 observed a compost pile that had dead animals on top of the piles and covered with flies. Skeletal remains were observed around the pile and were not completely covered. There was evidence of leachate running off toward a grassy area. A follow-up visit on October 7, 2008 indicated that the carcasses of two small pigs were lying next to the pile and skeletal remains could still be observed. The above mentioned facts indicate violations of this provision.

567 IAC 23.2(1) prohibits any person from allowing, causing, or permitting open burning of combustible materials, except as provided in 23.2(2) (variances) and 23.2(3) (exemptions). Over the course of the visits to 76 Ltd. DNR Field Office 6 observed several burn barrels around the facility indicating that trade waste from the facility was being improperly disposed of and burned. The above mentioned facts indicate violations of this provision.

567 IAC 100.4 prohibits a private or public agency from dumping or depositing or allowing the dumping or depositing of any solid waste at any place other than a sanitary disposal project approved by the director. Over the course of the visits to 76 Ltd. DNR Field Office 6 observed several burn barrels around the facility indicating that trade waste

LITIGATION REPORT for 76 Ltd. December 2008

from the facility was being improperly disposed of and burned. The above mentioned facts indicate violations of this provision.

c. Photographs



September 19, 2008. Picture shows the discharge from the Earthen Manure Storage Structure as well as the weeds and poor vegetation.



September 19, 2008. Picture shows inadequate freeboard for the Earthen Manure Storage Structure.



September 20, 2008. Tile discharge observed by DNR Field Office 6. Discharge was caused by 76 Ltd. manure application. Ammonia – 80 mg/L; BOD – 98 mg/L; TSS – 220 mg/L; Fecal Coliform – 480,000/100mL.



September 20, 2008. Slug of discolored water in the West Fork of Crooked Creek near the confluence from the discharge.



September 21, 2008. DNR Field Office 6 observed dead hogs on the compost pile at 76 Ltd.



September 21, 2008. DNR Field Office 6 found evidence of improper solid waste disposal and improper open burning at the 76 Ltd. facility.



September 23, 2008. Picture shows continued inadequate freeboard.



October 2, 2008. Picture shows continued inadequate freeboard.



October 2, 2008. Manure liquids and solids on the ground between the buildings and the earthen manure storage structure.

LITIGATION REPORT for 76 Ltd. December 2008

V. Past History

76 Ltd. has had previous warnings regarding the condition of the earthen manure storage structure. During an inspection on December 4, 2000, it was noted that there was poor vegetation and weeds on the berm. During an inspection on November 21, 2002, it was noted there was rodent infestation in the berm and cracked piping. During an inspection on October 21, 2005, it was noted that there was poor vegetation and weeds on the berm.

Additionally, 76 Ltd. and the DNR entered into Administrative Consent Order No. 2008-AFO-31 on October 2, 2008 to resolve violations concerning the submittal of the facility's updated MMP for 2008. The consent order included a \$2,000.00 penalty. 76 Ltd. submitted the updated MMP and paid the penalty. In addition to the consent order, 76 Ltd. was issued a Notice of Violation letter in August 2007 for failing to timely submit its updated MMP for 2007.

VI. Witnesses

The following Department personnel will be potential witnesses: Mark Heiderscheit, Aaron Pickens, Russ Royce, Bert Noll, Jon Ryk, and Ryan Stouder. Mr. Heiderscheit will be available during the January 13, 2009 EPC meeting to answer additional questions.